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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 550

S. DEAN SLOUGH,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, S. Dean Slough, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit that enforces a cease-and-desist order of the Federal Trade Commission.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-3a) is not yet reported. The opinion of the *Federal Trade Commission* (R. 77-107)[1] is reported at 1965-1967 CCH Trade Regulation Reporter Transfer Binder, ¶17,789. The Commission's cease-and-desist order is reprinted at R. 75-77 (App. B, *infra*, pp. 4a-6a).

[1] "R" refers to the Volume I of the Printed Record in the Court of Appeals.

Jurisdiction

The final decree of the Court of Appeals (App. C, *infra*, p. 7a) was entered on July 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Did the Federal Trade Commission exceed its remedial powers in restraining lawful acts and in imposing an order which shifts the burden of proof to the petitioner in a subsequent enforcement or penalty proceeding?

2. Did the Federal Trade Commission exceed its remedial powers by ordering complete excision of the trade name without giving careful consideration to other remedies?

Statute Involved

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state

its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such methods of competition or such act or practice.

Statement

After administrative proceeding, the Federal Trade Commission held that the debt collection forms which petitioner, doing business as State Credit Control Board, sells to businessmen tended to mislead debtor recipients into believing that:

(a) The forms emanate from some type of governmental entity having responsibility over delinquent accounts.

(b) The payment requests are sent out by petitioner as a third party having authority to collect these delinquent accounts.

(c) Legal action with respect to delinquent accounts has been or is about to be initiated.

Although the Commission had been asked by petitioner that the proceeding be remanded to the hearing examiner to consider remedies other than complete excision of the trade name which may also satisfy the Commission that no misrepresentation would be conveyed, the request was ignored and in its final decision the Commission gave no indication that any consideration was given to a remedy short of complete excision of petitioner's trade name.

Although Slough had testified before the Commission that he was legally authorized to conduct business as a collection agency, did in the past operate as such, and intended, in the future, to conduct such a business as a collection agency, authorized by creditors to collect their

accounts, the Commission ordered him to cease and desist from:

> "5. *Authorizing any creditor to utilize respondent's name* or any trade name or style which respondent may adopt or use *in connection with any debt collection activity* whether directly or through third parties on the part of such creditor;
>
> 6. Representing directly or by implication that:
>
> (a) Respondent is engaged in the business of collecting delinquent accounts with authority to effect collection by whatever means necessary;
>
> (b) Any delinquent account has been referred to it for collection;
>
> (c) Any legal or other action will be instituted to effect collection or reflect unfavorably on the credit rating of the debtor;
>
> Provided, However, it shall be a defense hereunder for respondent to establish that it is engaged in the bona fide collection of delinquent accounts, has the authority and good intent to take any represented action, and the specific account in question has been referred to it for collection;"

Slough appealed to the Court of Appeals for the Fifth Circuit on the grounds among others that:

> (a) The Commission exceeded its authority by issuing an order which restrains lawful acts and shifts the burden of proof to defendant in any enforcement or penalty action.
>
> (b) The Commission abused its discretion in ordering complete excision of the trade name without giving careful consideration to the possibility of qualification.

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-3a) completely ignored the issue of the Commission's failure to fulfill its obligation to consider remedies short of complete destruction of the trade name and on the grave issue of reversing the burden of proof the Court of Appeals

appeared to approve the Commission's action in the last sentence of its opinion:

> "Moreover the Commission's order provides that a good faith intent to institute legal action will constitute a defense to any charge that the order has been violated."

Reasons For Granting The Writ

1. The holding of the court below which approves and enforces a Commission order shifting the burden of proof to the defendant in a subsequent enforcement or penalty proceeding, directly conflicts with the decision of the Court of Appeals for the Second Circuit in *Federated Nationwide Wholesalers Service, et al. v. Federal Trade Commission* (No. 306, decided July 8, 1968, reprinted in App. D, *infra*, pp. 16a-19a). There, as in the present case, the Commission attempts to shift the burden of proof by enjoining lawful conduct and adding a proviso permitting defendants to prove in defense that their representations were substantially true and not deceptive. That Court said:

> "We are aware of no precise precedent in the case law for the form of order which the Commission has here chosen to impose. * * * Research discloses no case dealing with a precise equivalent of the reverse-burden-of-proof order with which we are faced. In *Western Radio Corp. v. F. T. C.*, 339 F. 2d 937, 940 (7 Cir. 1964), cert. denied, 381 U.S. 938 (1965) * * * the Seventh Circuit * * * did not squarely face this problem; and it said by way of dictum: 'We do not anticipate that some court at some future time will regard this order as changing the ordinary rules as to the burden of proof.' 339 F. 2d at 940. The present order is too explicit to be subject to a validating interpretation and it is necessary to decide the point that the Seventh Circuit left open. We hold that the Commission exceeded its remedial powers in imposing an order which shifts the burden to the petitioners in a subsequent enforcement or penalty proceeding."

2. The Court should resolve the conflict because it involves an important issue affecting the Commission's regulatory function in all deceptive practice cases. It is apparent that the Commission has adopted the reverse-burden-of-proof type order as a standard practice. As the Second Circuit Court of Appeals has noted this kind of order "leaves open no path on which [a business] can travel without anxiety." If the Commission is left free to impose, as sanctions, orders such as this one "which sweeps across lawful and unlawful behavior without distinction" then it is being permitted to go beyond its mission to prevent deceptive practices and will be putting out of business many firms which can no longer make necessary, truthful and honest representations without fear of penalties or the harassment of unnecessary litigation.

3. If this conflict remains unresolved neither the Commission nor the business community can regard future cease and desist orders as enforceable, for either party may shop around for a Circuit Court of Appeals which agrees with its position.

4. The Court below has unfortunately given its *imprimatur* to an order which allows defendants to be summoned into court to prove their innocence, a requirement which is certainly alien to our basic concept of justice and which is so at odds with Anglo-Saxon jurisprudence that to permit the Federal Government to wander off in this direction will cause a serious wrench in the established order.

5. It has been necessary for this Court on at least two occasions to remind the Federal Trade Commission that the policy of the law is to protect trade names as valuable assets of a business and that their destruction should not be ordered without considering other remedies which

would accommodate this policy with the policy of preventing deceptive trade practices. *F. T. C. v. Royal Milling Co.*, 288 U.S. 212 (1933); *Jacob Siegel & Co. v. F. T. C.*, 327 U.S. 608 (1946). The Federal Trade Commission has not seen fit to follow this policy of the law in this case and in several others. *Magnaflo Co., Inc. v. F. T. C.*, 343 F. 2d 318 (1965); *Korber Hats, Inc. v. F. T. C.*, 311 F. 2d 358 (1962); *Elliot Knitwear v. F. T. C.*, 266 F. 2d 787 (1959); *Educator's Ass'n, Inc. v. F. T. C.*, 110 F. 2d 72 (1940).

6. Nowhere in the record does the Commission indicate that it gave any consideration to a remedy short of complete excision of the trade name although requested to do so. The record shows only arguments of Appellate Counsel that other remedies would not be effective and "the courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. U. S.*, 371 U.S. 156, 167, 83 S. Ct. 239, 246 (1962); *S. E. C. v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 1760 (1947). The Court below erred in its failure to follow the policy of the law as enunciated by this Court which required a remand of the case to the Commission.

Conclusion

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 18, 1968.